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7 UNITED STATES OF AMERICA,  
8 Plaintiff,  
9 v.  
10 DEREK F.C. ELLIOTT,  
11 Defendant.

Case No. 12-cr-00678-MMC-2

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**ORDER DENYING DEFENDANT'S  
MOTION TO RECONSIDER  
MODIFICATION OF IMPOSED TERM  
OF IMPRISONMENT**

By indictment filed September 18, 2012, the government alleged defendant Derek F.C. Elliott ("Elliott") had committed mail fraud in connection with a scheme to defraud investors in a resort located in the Dominican Republic. On August 27, 2014, Elliott pleaded guilty to Count 1 of the indictment. (See Plea Agreement, filed August 27, 2014, ¶ 1.) On November 6, 2019, and November 20, 2019, the Court conducted a two-day sentencing hearing, and, on November 20, 2019, sentenced Elliott to a 24-month term of imprisonment. On December 19, 2019, judgment was entered, imposing said term of imprisonment.<sup>1</sup>

On April 4, 2020, Elliott filed a "Motion for Modification of Imposed Term of Imprisonment" ("Initial Motion"), pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), whereby he sought an order modifying his prison term to one of home confinement. By order filed May 11, 2020 ("May 11 Order"), the Court denied Elliott's Initial Motion. Now before the

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<sup>1</sup> On September 30, 2020, an Amended Judgment was filed for the purposes of reflecting the Court's findings regarding restitution.

United States District Court  
Northern District of California

1 Court is Elliott's "Motion to Reconsider Modification of Imposed Term of Imprisonment,"  
2 filed September 11, 2020. The government has filed a Statement of Non-Opposition.  
3 Thirty-three victims of the scheme for which Elliott was convicted have submitted  
4 statements opposing the motion, to which statements Elliott did not reply. Having read  
5 and considered the papers filed in support of and in opposition to the motion for  
6 reconsideration, the Court rules as follows.

7 18 U.S.C. § 3582(c) provides as follows:

8 The court may not modify a term of imprisonment once it has been imposed  
9 except that –

10 (1) in any case –

11 (A) the court, upon motion of the Director of the Bureau of Prisons, or  
12 upon motion of the defendant after the defendant has fully exhausted all  
13 administrative rights to appeal a failure of the Bureau of Prisons to bring a  
14 motion on the defendant's behalf or the lapse of 30 days from the receipt of  
15 such a request by the warden of the defendant's facility, whichever is  
16 earlier, may reduce the term of imprisonment (and may impose a term of  
17 probation or supervised release with or without conditions that does not  
18 exceed the unserved portion of the original term of imprisonment), after  
19 considering the factors set forth in section 3553(a) to the extent that they  
20 are applicable, if it finds that –

21 (i) extraordinary and compelling reasons warrant such a  
22 reduction . . .

23 and that such a reduction is consistent with applicable policy  
24 statements issued by the Sentencing Commission . . .

25 See 18 U.S.C. § 3582(c).

26 In its order denying his Initial Motion, the Court found Elliott was not entitled to the  
27 relief sought, on two separate grounds: (1) he was not in the custody of the Bureau of  
28 Prisons ("BOP") at the time the motion was filed and (2) he failed to show the requisite  
extraordinary and compelling reasons warranting such relief. In bringing the instant  
motion, Elliott has failed to address in any manner the first of those two grounds,  
specifically, that, at the time he filed the Initial Motion, he was not in the custody of the  
BOP, a status that continues to exist as of today's date. To bring a motion to "reduce" a  
sentence under § 3582(c)(1)(A), often referred to as a motion for "compassionate  
release," see, e.g., United States v. Alam, 960 F.3d 831, 832 (6th Cir. 2020), the

1 defendant must be in a position to be released, i.e., in custody, see id. at 835 (citing  
2 § 3582(c)(1)(A); noting "Congress gave inmates an option to seek early release"). Here,  
3 as set forth above and in the Court's May 11 Order, Elliott has never served any part of  
4 his term of imprisonment.

5 Accordingly, for this reason alone, Elliott's motion for reconsideration will be  
6 denied. See, e.g., United States v. Jordan, 2020 WL 4195353, at \*3 (S.D. N.Y. July 16,  
7 2020) (denying as premature motion for relief under § 3582(c)(1)(A)(i) where defendant  
8 had not begun serving term of imprisonment); United States v. Spruill, 2020 WL 2113621,  
9 at \*3 (D. Conn. May 4, 2020) (same).

10 The Court next turns to the second ground on which the Court's denial of the Initial  
11 Motion was based, namely, Elliott's failure to identify any "extraordinary and compelling  
12 reasons" warranting relief. See 18 U.S.C. § 3582(c)(1)(A)(i). In his Initial Motion, Elliott  
13 asserted such reasons existed in light of the "worsening global pandemic" (see Initial  
14 Motion at 8:7-8), the BOP's designation of Elliott to an institution "already incubating the  
15 disease" (see id. at 11:3-4), and the BOP's designation of his co-defendant, James  
16 Catledge ("Catledge"), to a facility that has a "host of prison services" unavailable at  
17 Elliott's designated facility and that houses less "violent" prisoners than those housed in  
18 the type of prison to which Elliott has been designated (see id. at 15:2-21).

19 In the instant motion, in addition to the above, Elliott contends circumstances  
20 occurring after issuance of the May 11 Order warrant a finding that Elliott, when  
21 compared to Catledge, will be subjected to an "unjustified sentence disparity." (See  
22 Def.'s Mot. for Reconsid. at 5:6, 8:1.) In particular, Elliott relies on the BOP's having  
23 released Catledge from custody after Catledge had served only thirteen months of his  
24 sixty-month term of imprisonment, and the fact that Catledge is now serving the

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1 remainder of his sentence in home confinement.<sup>2</sup>

2 In support of his argument, Elliott relies on 18 U.S.C. § 3553, which provides that a  
3 court, "in determining the particular sentence to be imposed," see 18 U.S.C. § 3553(a),  
4 must consider "the need to avoid unwarranted sentencing disparities among defendants  
5 with similar records who have been found guilty of similar conduct," see 18 U.S.C.  
6 § 3553(a)(6). The disparity on which Elliott relies, however, is not a "sentencing  
7 disparity," see id., but, rather, a post-sentencing disparity, and in this instance moreover,  
8 one resulting from a determination made by the BOP, not the Court.

9 Accordingly, for this additional reason as well, Elliott's motion for reconsideration  
10 will be denied.

11 Lastly, although a question exists as to whether "policy statements issued by the  
12 Sentencing Commission," see 18 U.S.C. § 3582(c)(1)(A), are binding on district courts  
13 where a § 3582(c) motion is brought by a defendant rather than the BOP, such  
14 statements may be considered as instructive. In particular, the Sentencing Commission  
15 has enumerated various circumstances constituting "extraordinary and compelling  
16 reasons" sufficient to warrant a reduced sentence, see U.S.S.G. § 1B1.13 cmt n.1, each  
17 of which relates to the defendant's health, age, or family circumstances. See id. A  
18 determination by the BOP as to the manner in which Elliott is likely to serve his sentence,  
19 as compared with any determination made by the BOP as to Catledge, does not fit within  
20 any category of extraordinary and compelling reasons identified by the Sentencing  
21 Commission, and, indeed, bears no resemblance to any of those circumstances.

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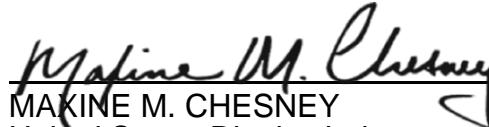
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25 <sup>2</sup> It appears the BOP, in releasing Catledge without seeking court approval, relied  
26 on a provision in the CARES Act, under which, during the COVID-19 pandemic, "the  
27 Director of the [BOP] may lengthen the maximum amount of time for which the Director is  
28 authorized to place a prisoner in home confinement under the first sentence of section  
3624(c)(2) of title 18, United States Code, as the Director determines appropriate." See  
Coronavirus Aid, Relief, and Economic Security Act, § 12003(b)(2), Pub. L. No. 116-136,  
134 Stat. 281 (March 27, 2020); see also 18 U.S.C. § 3624(c)(2) (providing BOP may  
"place a prisoner in home confinement" for no more than "six months").

1 **CONCLUSION**

2 For the reasons stated above, Elliott's motion for reconsideration is hereby  
3 DENIED.

4 **IT IS SO ORDERED.**

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6 Dated: November 5, 2020

  
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MAKINE M. CHESNEY  
United States District Judge